

REVIEW OF PERSONAL INJURY LITIGATION COSTS:
THE SUPPLEMENTARY REPORT AND FIXED RECOVERABLE
COSTS

HELEN NUGENT, No. 18 CHAMBERS
SEPTEMBER 2017



PRELIMINARY



- DISTINCTION BETWEEN ACTUAL COSTS + RECOVERABLE COSTS
- THE HOLY GRAIL = A SYSTEM IN WHICH THE ACTUAL COSTS OF EACH P ARE A MODEST FRACTION OF THE SUM IN ISSUE
- EMPHASIS ON THE IMPORTANCE OF CONTROLLING THE RECOVERABLE COSTS IN ADVANCE
 - TO IMPOSE DISCIPLINE; AND
 - TO GIVE THE PS CERTAINTY
- HOW CAN THIS BEST BE ACHIEVED?
 - BY MODIFYING THE PROCEDURAL RULES W/THE AIM OF REDUCING THE ACTUAL COSTS SO FAR AS POSSIBLE;
 - RESTRICTING THE RECOVERABLE COSTS TO WHAT IS PROPORTIONATE (APPLYING THE NEW PROPORTIONALITY RULE UNDER CPR R. 44.3(5))
 - CONTROLLING THE RECOVERABLE COSTS IN ADVANCE [FRC + COST MANAGEMENT/BUDGETING]

THE NEW PROPORTIONALITY RULE

- CPR R.44.3(5) – THE BASIS OF THE ASSESSMENT
- SUMS ARE PROPORTIONATE IF THEY BEAR A REASONABLE RELATIONSHIP TO:
 - THE SUMS IN ISSUE IN THE PROCEEDINGS;
 - THE VALUE OF ANY NON-MONETARY RELIEF IN ISSUE;
 - THE COMPLEXITY OF THE LITIGATION;
 - ANY ADDITIONAL WORK GENERATED BY THE CONDUCT OF THE PAYING P; AND
 - ANY WIDER FACTORS INVOLVED IN PROCEEDINGS SUCH AS REPUTATION OR PUBLIC IMPORTANCE

PARA 44.3.3:

ON AN APPLICATION ON A/C OF COSTS IN *HARD FOUGHT* LITIGATION INVOLVING LARGE SUMS OF £ + WHERE THE PS HAVE SPARED NO EXPENSE; THE *TOUCHSTONE* (OF REASONABLE + PROPORTIONATE COSTS) IS NOT THE AMOUNT OF COSTS WHICH IT WAS IN THE BEST INTERESTS OF THE PS TO INCUR, BUT THE LOWEST AMOUNT WHICH IT COULD REASONABLY HAVE BEEN EXPECTED TO SPEND IN ORDER TO HAVE ITS CASE CONDUCTED + PRESENTED PROFICIENTLY HAVING REGARD TO ALL THE RELEVANT CIRCUMSTANCES. EXPENSE BEYOND THAT LEVEL IS NOT RECOVERABLE FROM THE PAYING P (SEE: KAZAKHSTAN KAGAZY PLC V ZHUNUS [2015] EWHC 404)

THE FAST TRACK

- LORD WOOLF [R]: ALL RECOVERABLE COSTS SHOULD BE FIXED IN THE FT
- CPR R.26.6(5) – FT = THE NORMAL TRACK FOR CASES WHERE THE ELH FOR TRIAL IS 1 X DAY
- THE SUPPLEMENTARY [R] DOES NOT ADDRESS FIXED COSTS UNDER THE PORTAL SCHEME WHERE LIABILITY IS ADMITTED + THE MATTER PROCEEDS TO A CPR PART 8 QUANTUM ASSESSMENT
- THE CURRENT FIXED COSTS REGIME:
 - WORKING SATISFACTORILY
 - PROPOSALS ON THE PART OF CS: BETTER PROVISION FOR PAD APPLICATIONS (SEE: SHARP V LEEDS CITY COUNCIL [2017] EWCA 33 [88] – [140])
 - ON THE PART OF DS: REVERSAL OF THE DECISION IN BIRD V ACORN [2016] EWCA CIV 1096 BY RULE CHANGE
- CPR PART 36 OFFERS V FIXED COSTS (BROADHURST V TAN [2016] EWCA CIV 94): DIVISION IN THE ASSESSMENT GROUP AS TO WHETHER INDEMNITY COSTS OR A % UPLIFT SHOULD BE AWARDED
- OTHERWISE, FIXED COSTS TO BE UPDATED PERIODICALLY TO REFLECT INFLATION BY REFERENCE TO THE SERVICES PRODUCER PRICE INDEX (ON THE LUMP SUM ASPECT OF COSTS ONLY)

THE FAST TRACK CONTINUED...

- NIHL CLAIMS CONSIDERED SEPARATELY BY A WORKING GROUP SET UP BY THE CIVIL JUSTICE COUNCIL
- MEDIATION AGREEMENT REACHED IN RESPECT OF COSTS + A PRESCRIPTIVE PROCESS
- PROPOSED MATRIX FOR COSTING CLAIMS: ALL FT CASES PLACED IN TO 4 X BANDS OF COMPLEXITY [BAND 1 – LEAST COMPLEX TO BAND 4- MOST COMPLEX]
- PARADIGM COSTS:
 - BAND 1 – RTA NON PI
 - BAND 2 – RTA PI + HOLIDAY SICKNESS
 - BAND 3 – EL/PL CLAIMS
 - BAND 4 – EL DISEASE [NON NIHL]
- JUDGES HAVE SOME DISCRETION AS TO ALLOCATION, BUT TO BE USED SPARINGLY!
- CPR R.45.29H – FIXED COSTS PROVISION FOR INTERIM APPLICATIONS APPLIES
- BUT, NIHL CLAIMS + CASES FALLING W/IN THE SCOPE OF BAND 4: 2/3 OF THE APPLICABLE TYPE A + TYPE B COSTS [AS OPPOSED TO 1/2]

ALLOCATION IN THE FT

- WHO DECIDES WHICH BAND + WHEN?
- PS ENCOURAGED PRE-ACTION TO AGREE [WHERE POSSIBLE], APPLICATION TO TRACK + APPLICATION TO RELEVANT BAND
- C TO STATE ALLOCATION PROPOSALS IN THE LOC
- D TO PROVIDE ITS PROPOSAL IN THE SUBSTANTIVE RESPONSE
- IN DEFAULT OF AGREEMENT, JUDGE DETERMINES AT ALLOCATION STAGE
- CHALLENGES TO ALLOCATION BY PAPER APPLICATION UNDER CPR R. 3.3(5)
- THE ESCAPE CLAUSE UNDER CPR R.45.29J WILL CONTINUE TO APPLY

COSTS MANAGEMENT

- IS COSTS BUDGETING A BETTER APPROACH TO CONTROLLING THE RECOVERABLE COSTS?
- INCURRED COSTS V ESTIMATED COSTS
- THE EFFECT OF CPR PD 3E 7.4: THE COURT MAY RECORD ITS COMMENTS ON THE INCURRED COSTS + TAKE THOSE INCURRED COSTS INTO ACCOUNT WHEN CONSIDERING THE REASONABLENESS + PROPORTIONALITY OF ALL SUBSEQUENTLY BUDGETED COSTS
- THE EFFICACY OF COSTS MANAGEMENT + THE IMPROVEMENTS IN BUDGETING HAVE BEEN SUCH THAT IT IS NO LONGER NECESSARY TO DEVELOP FRC ON THE SCALE PREVIOUSLY CANVASSED BY JACKSON LJ IN JANUARY 2016
- PROPOSAL RE: INCURRED COSTS – CONSIDER (A) A GRID FOR FRC FOR INCURRED COSTS AND (B) A PRE-ACTION PROCEDURE FOR SEEKING LEAVE TO EXCEED THE FRC IN THE GRID

THE INTERMEDIATE TRACK

- SCOPE FOR FIXING THE RECOVERABLE COSTS FOR SOME CATEGORIES OF CASES ABOVE THE FT
- EXTENSION OF THE FRC REGIME – UPPER LIMIT AT £100K; ONLY IN CASES OF MODEST COMPLEXITY
- VARIOUS OPTIONS AVAILABLE AS ALTERNATIVES TO THE NEW TRACK:
 - MT CASES SUBJECT TO FRC REGIME; OR
 - EXPANSION OF THE FT
- VALUE ALONE IS NOT THE SOLE CRITERION FOR ALLOCATION, CASES MUST ALSO BE SUITABLE FOR THE STREAMLINED PROCESS
- WHEN CONSIDERING TRACK – NO MORE THAN 2 X EXPERTS GIVING ORAL EVIDENCE AT TRIAL FOR EACH P
- MESOTHELIOMA + OTHER ASBESTOS RELATED LUNG DISEASES ARE EXCLUDED
- SAVE FOR APPLICATIONS TO APPROVE SETTLEMENT [CHILDREN + PROTECTED PARTIES], CPR PART 8 CLAIMS ARE ALSO EXCLUDED

THE INTERMEDIATE TRACK CONTINUED...

- AS W/FT CASES, A BAND SYSTEM WILL OPERATE, DIVIDING CASES INTO CATEGORIES OF COMPLEXITY
- THE COURT WILL HAVE ADDITIONAL DISCRETION AS TO ALLOCATION, WHERE CASES DO NOT SATISFY THE CRITERIA FOR THE INTERMEDIATE TRACK; BUT WHERE ALLOCATION IS NECESSARY TO PROMOTE ACCESS TO JUSTICE
- NEW PRACTICE DIRECTION TO BE INTRODUCED
- RESIDUAL POWER > COURT TO TAKE CASES OUT OF THE INTERMEDIATE TRACK
- STREAMLINED PROCESS:
 - STATEMENTS OF CASE [LIMITED TO 10 PAGES]
 - SERVED W/THE CORE DOCUMENTS
 - EXPERT [R]S LIMITED TO 20 PAGES
 - TRIAL – TIME LIMITS TO BE SET FOR ORAL EVIDENCE
 - APPLICATIONS TO BE MADE AT THE CMC, WHERE POSSIBLE
 - HANDING DOWN JUDGMENT – IF ALL CONSEQUENTIAL MATTERS ARE AGREED, ATTENDANCE IS DISPENSED W/
- PI LITIGATION = EXEMPT FROM THE PROPOSED DISCLOSURE RULES

- THE BANDS:

- BAND 1 – QUANTUM ONLY
- BAND 2 – LIABILITY + QUANTUM
- BAND 3 – LIABILITY + QUANTUM
- BAND 4 – SERIOUS ISSUES ON BREACH OF DUTY, CAUSATION + QUANTUM

DISBURSEMENTS – DEVELOPMENT OF FIXED COSTS FOR EXPERTS

CPR PART 36 OFFERS – % INCREASE!

CLINICAL NEGLIGENCE

- RECOMMENDATION – CIVIL JUSTICE COUNCIL TO WORK IN CONJUNCTION W/DEPARTMENT OF HEALTH TO DEVELOP A BESPOKE PROCESS FOR CLINICAL NEGLIGENCE MATTERS W/VALUE UP TO £25K

